for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ↦ Dean Trebesch, Maricopa County Public Defender

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I'M BAAACK! (Chuckie, 20th Century Philosopher): PROPOSITION 200, REVISITED.

By Russell G. Born
Public Defender Training Director

As most of you already know, Proposition 200, (hereinafter Prop 200) the "Drug Medicalization Prevention, and Control Act of 1996" is back! While legislators were busily eviscerating the initiative, several questions were raised about their power to amend. This article answers some of those questions as well as the issues of retroactivity; jail as an initial condition of probation; and the effect, or lack thereof, of historical priors on a Prop 200 disposition.

Can the Legislature Thwart the Will of the People and Amend an Amendment?

All right you caught me, this is a trick question. Proposition 200 was not an amendment to the Arizona Constitution. It was a legislative initiative. Does it really matter which one it was? Yes, especially if you are concerned with the percentage of qualified electors needed to put an initiative on the ballot. Petitions for amendments require the signatures of fifteen percent of the qualified electors but legislative initiatives need only ten percent.[1] Proposition 200 had more than enough signatures of qualified electors to place the measure on the ballot. At the general election, it passed with more than 65% of the votes cast on the measure, being cast in its favor. It became law on December 6, 1996.

The point in question however, is not the fact that it passed, but what percentage of *qualified electors* voted for its enactment. The meaning of the term qualified electors is a crucial issue. It is this term that dictates whether, subsequent to its passage, an initiative can be amended or repealed. An initiative measure that receives approval by a "majority of qualified electors" is immune from the Governor's and Legislature's power to repeal or amend.[2] What then does "majority of qualified electors" mean?

The Arizona Constitution specifically sets out a formula for determining the number of qualified electors.[3] Unfortunately, that paragraph applies to the number of qualified electors required to *sign* an initiative or referendum petition and does not define qualified electors for purposes of determining the percentage needed to

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approve the initiative at the polls. In order to determine the definition of a "majority vote of qualified electors," case law must be consulted.

In *Adams v. Bolin*,[4] the Arizona Supreme Court was asked to decide what the term "majority vote of the qualified electors" means. The Court took great pains to distinguish this term from a similar term used elsewhere in the Constitution, "majority of the qualified electors *voting thereon*."[5] Analyzing the journal of proceedings from the constitutional convention, California's Constitution, Oregon's Constitution, and Washington's Constitution, the Arizona Supreme Court settled on a definition. Relying upon the reasoning in a Wyoming case,[6] the Arizona Supreme Court defined "majority of qualified electors" to mean a majority of individuals who were *entitled* to vote in that election.

> "There is a marked distinction between a law approved by a majority of the qualified electors and a law approved by a majority of the electors voting thereon. . . . It is all too clear that the constitution makers knew the difference between a majority of the votes cast thereon and a majority of the vote of qualified electors."[7]

Speaking as a former Chicago precinct captain, it is a daunting task to get a majority of qualified electors to vote in favor of any measure. Even in Chicago, an initiative seeking to save the corner tavern from the wrecking ball (stirring even the dead to vote), would have a hard time meeting the "majority of qualified electors" test. Arizona, with its notoriously low voter turnout, will probably never see an initiative or referendum passed by a "majority of qualified electors." At the November 1996 election, Prop 200 passed by a nice margin, but not nearly enough to make it immune from repeal or amendment. Thus, the Arizona Legislature had the power to amend.

Arizona, with its notoriously low voter turnout, will probably never see an initiative or referendum passed by a "majority of qualified electors."

Legislators, claiming that their legislation implemented the "spirit" of Prop 200, amended several sections. In reality, it was more of an exorcism than an implementation! House Bill 2518 and Senate Bill 1373 gutted Prop 200. But do not fear! The legislature's changes are on hold. How can this be? The answer is the power of the referendum.

Can the People Tell the Legislature to Take a Hike Along with Their Amendments?

The people can, and they did! The Arizona Constitution reserves two legislative powers for the people. The first is the initiative power[8] and the second is the referendum power.[9] Initiatives are used to propose issues and get them before the voters. Referendums are used by the legislature or the voters to have measures, already enacted by the legislature, reviewed, with approval or disapproval by the voters. In order to force a referendum on a measure, only five percent of the qualified electors need to sign petitions. The referendum can be focused on any

> "measure, or item, section or part of any measure, enacted by the legislature, except for emergency laws necessary for the preservation of the public peace, health or safety, or for the support and maintenance of the departments of the State Government and State Institutions; . . ."[10]

Referendum petitions must be filed within ninety days after the close of the legislative session. In this case, two petitions were filed on or before the July 20, 1997 deadline, which was one day before the legislature's amendments took effect.

The petitions, calling for a referendum on Senate Bill 1373 and house Bill 2518, were accompanied by the required number of signatures. Once again the people will vote on Prop 200. This time it will be at the general

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election in 1998. Until that election, Prop 200, as passed by the voters, is still in effect!

Is There a Notch Group?

Interestingly enough, a question was raised about the possibility of a notch group of defendants! This would conceivably be those unlucky defendants who committed a Proposition 200 crime after July 21st (effective date of Senate Bill 1373), but before the formal announcement that the referendums would take place. Worried? Don't be! There is a reason for the requirement that referendum petitions be filed within ninety days after the end of the legislative session. A properly filed referendum petition has the effect of tolling the enactment of the targeted legislation.[11] Therefore, the coverage of Prop 200 never lapsed, nor has it ever been effectively amended or overruled.

Retroactive Application

In March 1997, Marie Dichoso-Beavers, Jennifer Wilmott, and myself filed a special action in the Court of Appeals Division One, addressing the following Prop 200 issues: retroactivity, incarceration as an initial condition of probation, and the effect of historical priors on Prop 200. Unfortunately, the Court decided that Prop 200 did not apply to persons *convicted* after the effective date, but only applied to crimes *committed* after the effective date.[12] Because our petitioners committed their crimes before the effective date, they did not qualify for Prop 200 treatment. The appellate court did not address the other two issues concerning incarceration and historical priors. Several arguments which we raised regarding the above two issues are set out below. The decision whether or not to file a Petition for Review is under consideration.

[The appellate court] rejected the state's argument that a judge would always retain the ability to impose an initial period of incarceration as a condition of probation by way of § 13-901, the general probation statutes.

Is Incarceration Available as an Initial Condition of Probation

The answer is no! There are three very powerful arguments that seem to dictate against incarceration as an initial term of probation. The first is the analogy that can be drawn between Prop 200 and the Domestic Violence Statute. The original Domestic Violence Statute, A.R.S. § 13-3601(G), set out an *entire scheme for the disposition of certain eligible offenders*. It provided for a deferral of the entry of a judgment of guilt while a defendant was on probation. It provided for counseling and diversionary programs. If the person violated probation, the court could then enter a judgment of guilt and proceed to sentencing, as in any other revocation of probation proceeding.

In *State v. Sirny*,[13] the defendant was sentenced to probation and an initial period of incarceration under 13-3601(G). Sirny appealed his term of incarceration. The appellate court, in ruling for Sirny, found that, whether or not Sirny had been convicted (judgment of guilt being deferred), was not relevant to its determination. They noted that § 13-3601 was a specific statute enacted by the legislature to deal with domestic violence. The statute, in setting out an entire scheme for the disposition of certain eligible offenders, was *silent* concerning jail as an initial condition of probation. In resolving the issue of incarceration in favor of Sirny, the appellate court resorted to rules of statutory interpretation. It rejected the state's argument that a judge would always retain the ability to impose an initial period of incarceration as a condition of probation by way of § 13-901, the general probation statutes. Instead they found that the statute was ambiguous regarding initial incarceration and was susceptible to more than one interpretation. Therefore, the rule of lenity applied, and any doubt should be resolved in favor of the defendant. Because the Domestic Violence Statute did not authorize a jail term as a condition of probation, Sirny's jail term was vacated. The court further held that, if the legislature wants to include a jail term as a condition of probation, "it must say so unmistakably."[14] Curing the problem, the legislature amended § 13-3601 in 1991 by inserting the language, "incarceration of the defendant in a county jail."

The similarities between the original Domestic Violence Statute and Prop 200 are striking. Prop 200, like the statute in *Sirny*, sets out an *entire scheme for the disposition of certain eligible offenders*. Under Prop 200, eligible offenders are those defendants charged with a first or second offense of personal use or possession of marijuana or controlled substance. Prop 200 does not create a separate substantive offense for which punishment can be imposed. It merely dictates the sentencing options available. The same was true for the original Domestic Violence Statute. Additionally, like the original Domestic Violence Statute, Prop 200 is silent concerning incarceration as a condition of probation.

Under Prop 200, in order to receive jail as an initial condition of probation, the legislature will have to specifically provide for it.

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The second argument that supports the theory that jail is unavailable, as an initial condition of probation, arises out of Prop 200, § 13-901.01 E. Under this section, defendants who violate probation must be reinstated, and some additional conditions may be imposed. But sanctions for violating must be *short of incarceration*.

If incarceration is not available as a sanction after a person has violated probation, then it would be contrary to logic to conclude that it is available prior to a violation, as an original condition of probation. If this were true, then effective representation would be to tell a client who received deferred jail and probation, not to report to their probation officer, thus violating probation. Upon violation, the client could not receive a jail sentence. This is a bizarre result and obviously not one intended by the voters.

Speaking of the voters' intent, one needs to look at the Analysis by Legislative Council, which was distributed to the voters before the election, as part of the initiative pamphlet. In paragraph three, it specifically states that a person who is sentenced to probation does not serve any time in jail or prison. That is pretty clear legislative intent!

[A] defendant who has previously been convicted of a crime that does not result in automatic exclusion from Prop 200, should be included in Prop 200 and sentenced accordingly.

If you have a client who receives jail as an initial condition of probation, in a Prop 200 disposition, file a memorandum or special action and feel free to use our arguments.

Historical Priors

(Two words: who cares!)

Historical priors were addressed by Jennifer Willmott in her special action. If the priors are not for a violent crime, as defined under § 41-1604.14(B), and this is not your client's third conviction for personal possession or use of a controlled substance as defined in § 36-2501, the number of priors is immaterial. Prop 200 amended Title 13, Chap. 9 § 13-901.01 to read:

> A. *Notwithstanding any law to the contrary*, any person who is convicted of the personal possession or use of a controlled substance as defined in § 36-2501 shall be eligible for probation. The court shall suspend the imposition or execution of sentence and place such person on probation.

This means that the enhancement provisions of § 13.604 that deal with historical priors do not affect probation eligibility in a Prop 200 case. Prop 200 is specific when addressing the issue of what type of prior felony convictions will exclude a defendant. Specific exclusion of certain defendants necessarily includes others. This is the doctrine of *expressio unis est exclusio alterius*. As applied to statutory construction, it "means that the expression of one or more items of a class, and the exclusion of other items of the same class, implies the legislative intent to exclude those items not so included."[15] Using this doctrine leads to the conclusion that a defendant who has previously been convicted of a crime that does not result in automatic exclusion from Prop 200, should be included in Prop 200 and sentenced accordingly. It doesn't matter how many priors the client has. Make sure, however, that you look closely at the nature of your client's priors before deciding they qualify for probation under Prop 200.

Conclusion

The voters will once again be voting on Prop 200 in November of 1998. Perhaps before then, we will have some answers from the courts concerning the issues of incarceration and historical priors. Obviously the legislature misjudged the intent and resolve of the electorate to change the direction of Arizona's war on drugs. Hopefully, the courts won't do the same!

(See attached Sentencing Memorandum written by Russ Born and Jeremy Mussman)

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1. A.R.S. Const. Art. 4 Pt. 1 § 1(2)
2. A.R.S. Const. Art. 4 Pt. 1 § 1(6)
3. A.R.S. Const. Art. 4 Pt. 1 § 1(7)
4. *Adams v. Bolin* 74 Ariz 269, 247 P.2d 617 (1952)
5. A.R.S. Const. Art. 21 § 1
6. *State ex rel. Blair v. Brooks* 17 Wyo 344, 99 P. 874
7. *Adams v. Bolin* Id. at 620
8. A.R.S. Const. Art. 4 Pt. 1 § 1(2)
9. A.R.S. Const. Art. 4 Pt. 1 § 1(3)
10. A.R.S. Const. Art. 4 Pt. 1 § 1(3)
11. Western Devcor Inc. v. City of Scottsdale 168 Ariz 426, 814 P.2d 767 (1991)
11. Baker v. Superior Court 251 Ariz. Adv. Rep. 28 (97)
13. State v. Sirny 160 Ariz 292, 772 P.2d 1145 (1989)
14. State v. Sirny Id. at 1148
15. Southwestern Iron & Steel Industries v. State 123 Ariz 78, 597 P.2d 981 (1979) ■

FROM THE PHOENIX DESK . . . JUVENILE DUI: JAIL'S NOT JUST FOR GROWN-UPS ANYMORE

By Gary Kula, Executive Director, City of Phoenix Public Defender Contract Administrator's Office

As of July 21, 1997, juveniles stopped and charged with DUI are being treated and sentenced pretty much the same way as adult offenders. The new statutes represent a drastic change in philosophy as to the treatment of juveniles who are adjudicated delinquent for DUI. Traditionally, emphasis had been placed on the education of juveniles as to the dangers of drinking/taking medications and then driving. As part of this rehabilitative process, juveniles were required to complete an alcohol/drug screening along with any follow up treatment which was deemed appropriate.

Somewhere along the way, our legislators felt that it was important that juveniles automatically spend time in custody in misdemeanor DUI cases, regardless of their age, the facts of the case, or their law-abiding history. Now, as outlined below in the Title 8 and 13 amendments, juveniles will spend the same amount of time in custody as adults in DUI cases. The only difference being, the time spent in custody for a first offense will be at a juvenile detention center, while second time offenders (30 days) and those charged with Aggravated DUI will constructively spend their time in either a juvenile detention center or the Department of Juvenile Corrections. The statutory provisions which form the basis for the processing of a juvenile DUI case are spread across Titles 8, 13, and 28. The amendments found in Titles 8 and 13 went into effect July 21, 1997, while the provisions outlined in Title 28 will not go into effect until October 1, 1997.

Somewhere along the way, our legislators felt that it was important that juveniles automatically spend time in custody in misdemeanor DUI cases, regardless of their age, the facts of the case, or their law-abiding history.

TITLE 8 AMENDMENTS

A.R.S. § 8-249 Disposition of Offenses Involving Driving or Being in Actual Physical Control of a Motor Vehicle While Under the Influence of Intoxicating Liquor or Drugs

A. A juvenile found delinquent for violating 28-692 shall be incarcerated for 24 consecutive hours.

B. If a juvenile is found delinquent for a second offense within sixty months, s/he shall be incarcerated for thirty consecutive days that shall be served in a juvenile detention center or in the Department of Juvenile Corrections.

C. A violation of 28-697 (Aggravated DUI) will result in the juvenile being sentenced pursuant to 28-697. However, the incarceration will be at a juvenile detention center or the Department of Juvenile Corrections.

D. The court *shall* order a fine of $100 - $500 plus surcharges. The court *may* order eighty hours of community service.

E. A prior offense is determined by the date of commission of an offense, irrespective of the sequence of the time of commission.

F. The court *shall* order alcohol or drug screening. The court *may* order the juvenile to obtain further education or treatment. The juvenile will pay the cost of screening, education or treatment unless the court waives partial or full costs. However, the court *may* order a parent or guardian to pay these costs.

**Effective October 1, 1997 any references to 28-692 will change to 28-1381 and 28-697 will change to 28-1838.

A.R.S. § 8-222 added subsection D which allows a court to proceed on a juvenile matter after the juvenile turns eighteen years of age without the filing of a new Arizona Traffic Ticket and Complaint Form or complaint. This eliminates the current practice of the State in dismissing and refiling charges after the juvenile turns eighteen on misdemeanor, petty offenses or civil traffic violations. The statute provides:

D. If a juvenile reaches eighteen years of age during the pendency of a delinquency action in

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any court in this state, for an act that, if committed by an adult, would be a misdemeanor or petty offense or a civil traffic violation, the court shall transfer the case to the appropriate adult court, together with all of the original accusatory pleadings and other papers, documents and transcripts of any testimony relating to the case. The adult court shall then proceed with all further proceedings as if a Uniform Arizona Traffic Ticket and Complaint form or a complaint alleging a misdemeanor or petty offense or a civil traffic violation had been filed with the adult court pursuant to section 13-3903 or the Arizona Rules of Criminal Procedure or the Rules of Procedure.

ASSORTED TITLE 13 AND TITLE 28 AMENDMENTS AFFECTING JUVENILES

A.R.S. § 13-501 Juvenile Transfer to Adult Court

A) Juveniles 15 years of age or older shall be tried as an adult who commit the following offenses: Aggravated DUI, 28-697

B) Juveniles 14 years of age or older may be charged as an adult by the County Attorney, if they commit any of the following offenses: Aggravated DUI, 28-697

A.R.S. §§ 28-445.01 & 28-3320 Suspension of License for Persons 18 Years of Age

A.3) The license or privilege to drive of any person under 18 years of age shall be suspended for a conviction of criminal damage under 13-1602.A.5 or similar city or town ordinance

A.R.S. §§ 28-697 and 28-1838 Aggravated DUI

A.2) An order of a juvenile court adjudicating a person delinquent is equivalent to a conviction, for the purposes of this paragraph, in calculating a 3rd or subsequent conviction within 60 months.

Now that these adjudications result in mandatory detention time, mandatory suspensions count as priors for purposes of mandatory sentencing enhancement. This will result in numerous legal challenges and arguments in support of the demand for a jury trial. Perhaps the best challenge will come in the case where a juvenile turns 18 in the middle of their DUI trial. Certainly, if they are going to start punishing kids as adults, they need to start thinking about protecting their rights like adults. ■

MAJOR FELONY GROUP TO BEGIN IN OCTOBER

By Jim Haas
Senior Deputy Public Defender

On October 6, 1997, the MCPD Major Felony Group will begin operation. **Emmet Ronan** and **Brad Branskywill** be the group's first attorneys. **Pam Davis**, Group A's client services coordinator, will join the group as a capital mitigation specialist. A third attorney will likely be added in January or February, 1998.

The result of these changes is that, more than ever before, the most important stage in death penalty litigation is the first stage: pretrial preparation, mitigation investigation, trial, and sentencing.

This group is being created in response to the dramatically changing death penalty environment. Last year, the Antiterrorism and Effective Death Penalty Act became law, limiting post-conviction relief for those sentenced to death. The Arizona Supreme Court has adopted strict new rules governing minimum qualifications for capital trial counsel, which will take effect on January 1, 1998.

The result of these changes is that, more than ever before, the most important stage in death penalty litigation is the first stage: pretrial preparation, mitigation investigation, trial, and sentencing. The days of relying on the appellate and federal courts to provide a safety net are over.

Our office's reaction to this new environment has been the subject of a great deal of discussion in the last year. It is clear that we must give attorneys who handle capital cases more time and resources to devote to these cases. Most of the larger public defender offices across the country have addressed this problem by creating a major felony or capital defense unit. In Maricopa County, the Legal Defender's Office and the Office of Court-Appointed Counsel have been largely successful in accomplishing this goal by designating some attorneys as "major felony" attorneys. Last May, a group of senior

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attorneys from our office, the Legal Defender's Office, and the Office of Court-Appointed Counsel recommended that we create a major felony unit.

Cases

At the outset, only first degree murders will be automatically assigned to the Major Felony Group. Ultimately, we will use the definition of "major felony" that is presently employed by the Legal Defender and OCAC: all first degree murder cases, and any other case that is expected to take more than 100 hours of attorney time. Other types of major cases will be added later, as needed, and will be transferred to the Major Felony Group when it is determined that they will take over 100 hours.

Homicides that are not first degree will presumptively stay in the trial groups. Trial group attorneys will second-chair major felony attorneys on capital cases. This will enable trial group attorneys to continue their involvement in capital cases, and to develop the skills and experience necessary to meet the qualifications for appointment as lead counsel in capital cases in the future.

[The tasks of the litigation assistants] are a unique combination of office aide, investigator, second chair attorney, initial services, client co-ordinator and secretary.

It is anticipated that major felony attorneys will handle approximately fifteen to twenty major cases per year. This is roughly equivalent to the caseloads handled by the major felony attorneys in the Legal Defender's Office.

Attorneys

To be assigned to the Major Felony Group, an attorney must qualify as lead counsel in capital cases under the rules adopted by the Arizona Supreme Court. The new rules provide that, to be eligible for appointment as lead counsel, an attorney must:

> (1) have practiced in the area of state criminal litigation for five years immediately preceding the appointment;
>
> (2) have been lead counsel in at least nine felony jury trials that were tried to completion, and have been lead counsel or co-counsel in at least one capital murder jury trial;
>
> (3) be familiar with the *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*; and
>
> (4) have attended and successfully completed, within one year of appointment, at least twelve hours of relevant training or educational programs in the area of capital defense.

Major felony attorneys will work in the group for a minimum of three years, but **must** rotate out in no more than five years. This mandatory rotation, and the expected growth of the group, will give trial group attorneys a reasonable opportunity to join the group after they become qualified. The first group of major felony attorneys will rotate out on a staggered schedule, to avoid all of them rotating out at the same time. If a major felony attorney wants to rotate out before the expiration of three years, every effort will be made to accommodate the request. A major felony attorney who rotates out will return to his or her former division and/or trial group, if possible.

For the time being, major felony attorneys will stay in their existing offices, and will work with their existing support staff. Eventually, consideration will be given to locating the entire Major Felony Group together, including staff, with the exception of at least one attorney stationed in Mesa.

Major felony attorneys will not receive additional compensation for the assignment. Major felony attorneys will be higher level attorneys whose job descriptions encompass service in this type of special unit as a normal part of their duties. ■

WHAT DO YOU DO? or A DAY IN THE LIFE OF A LITIGATION ASSISTANT

By Joyce Bowman and Angela Fairchild
Maricopa County Public Defender Litigation Assistants

Editor's Note: With the recent expansion of our litigation assistant program into Groups A and B, and soon into C, we decided to ask our original two litigation assistants (from Group D) about their experiences and suggestions on how the trial attorneys and litigation assistants can

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productively join together on certain types of cases. Joyce and Angela set the tone and quickly demonstrated what a useful resource these paraprofessionals can become, when they piloted our original concept back in January of 1996.

Attorneys often ask us the question, "What do you do?" It is almost as though we are alien beings and no one is quite sure why we are here. Or, large amounts of discovery and evidence are dumped either on our desk or, in some cases, on the floor with the admonition, "Organize this and I don't care how you do it. Just have it done by such and such a date." This is the world of the litigation assistant in our office. You name it; we do it. If we don't know how, we soon learn what needs to be done.

The litigation assistant does have a generalized job description, as all county positions do. But, in truth, our tasks are a unique combination of office aide, investigator, second chair attorney, initial services, client co-ordinator and secretary. (Neither of us can type and we have concluded that it is a definite plus!) We also share some of the legal clerks duties, in that we can do legal research, but our emphasis is on non-legal, topical research and writing, such as shaken baby syndrome, medical uses of marijuana, and sexual propensity research. Our typical duties are listed as trial preparation and organization, gathering and organizing documentation, development of trial exhibits, interviewing and preparing clients and witnesses for trial testimony, summarizing discovery and helping in jury selection.

Of course, in reality, the attorney and the litigation assistant relationship has turned into a close and trusting collaboration.

As our office has grown over the years, the types of cases have grown, not only in number, but in seriousness and complexity. Many times our office and the assigned attorneys are ill equipped to handle such cases because of time and resource restraints. At this point in time, the litigation assistant can become an invaluable aide and ally. We are usually assigned specialized types of cases that are class 1, 2 or 3 offenses, sex crimes, crimes against children, high profile cases and those cases that have voluminous amounts of discovery. In turn, we have a lower case load than the attorneys and can spend many more hours on any individual case as needed.

OK, you are still asking "What can you do specifically for me?" To begin, we both like to be assigned as soon as possible. We feel the sooner, the better, even before the discovery begins to come in. Our first step is to begin to read everything. As we read, we begin to get a definite "feel" for a case, which we then discuss with the attorney. Included in this step is listening, viewing and summarizing all of the audio and video tapes. Once we know how the case is going to develop, we then decide on how best to organize the material, including witness, police officer, scene, lab reports, finger prints, autopsy, etc. During this process, we usually learn every detail of the case and can discover the missing reports and other discovery, such as photos, diagrams, maps etc.

During this reading/organizing stage, the case becomes "ours" versus "yours." Of course, in reality, the attorney and the litigation assistant relationship has turned into a close and trusting collaboration. It is always best to keep your assistant informed of any new aspects to the case; we feel strongly about our cases and do not like to lose anymore than the attorney does!

Within this organizing and summarizing stage, we have developed various techniques of the trade. We have learned how to make various tables to organize evidence, lab reports, finger prints, and witness lists and descriptions. We can prepare diagrams and exhibits for trials, as well as jury notebooks. The organization of cases is up to the attorney. We know each of you has a different style and we will custom-design your case to fit your needs. If you prefer, we have our own ideas on how to organize and maintain a file. For cases that have large amounts of discovery, we will give you an index of how everything is arranged. You can count on us to know where every piece of discovery can be located. We feel that, for us to be most effective during this pretrial preparation, we need (and like) to attend most, if not all, court dates, witness interviews, case meetings, and anything you feel is important. So please, keep us apprised.

At trial we can assist with jury selection, keeping notes, finding discovery, and tracking specific exhibits. Not only have we helped at trials, but we also have been involved in other types of hearings. We have done work for mitigation hearings, suppression hearings, special actions, Frye hearings, Dessaurault hearings, etc. In addition, we have worked directly with expert witnesses in preparation for these hearings.

On a more personal side, we add a different perspective to our cases. We both have social science

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degrees and can add a separate and distinct viewpoint all of our own; we do not think like either a lawyer or an investigator. Sometimes this can be useful, especially when the attorney, investigator and the litigation assistant work together as a team.

■

COMPLIANCE FACILITATION: ADULT PROBATION'S NEWEST PROGRAM

By John Wertsching
Maricopa County Adult Probation Officer

Editor's Note: This article is reprinted from Maricopa County Adult Probation's second quarter brochure, "A Brief Update From Adult Probation."

In an effort to reduce the number of probation cases returning to court for probation violations, the [Probation] Department has begun an offender/probation officer mediation service named "Compliance Facilitation." This program utilizes the skills of a professional, volunteer mediator from the Court's Dispute Resolution Office. Cases that meet criteria for a petition to revoke probation are staffed with the unit supervisor and, if appropriate and no new offense has occurred, the case is submitted for mediation.

In an effort to reduce the number of probation cases returning to court for probation violations, the [Probation] Department has begun an offender/probation officer mediation service named "Compliance Facilitation."

A session with the offender, probation officer, probation supervisor, and mediator is then held, and the offender is empowered to decide what is needed to avoid court action and fulfill their end of a behavioral contract. After completing the Facilitation Session, the unit supervisor makes regular follow-up checks with the officer to gauge success or failure of the facilitation.

Though still too early to fully measure the success of the program, it does appear to show some merit. To date, eight (8) sessions have been completed with only two cases resulting in a petition to revoke probation. For further information, please call John Wertsching at 268-0284. ■

SELECTED 9TH CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

United States v. Collins, 1997 U.S. App. LEXIS 16977

Supervised release in the federal system is akin to community supervision, but with significant differences. It follows a prison sentence, but does not represent an early release from that sentence. Violations of supervised release carry different periods of additional prison and/or supervised release, depending on what the violation was, the category of crime the defendant was originally convicted of, and his/her criminal history.

Two defendants appealed sentences imposed for violating supervised release conditions. Each one was originally sentenced to a prison term with a specified period of supervised release to follow. Each violated supervised release and had their release revoked. Each was then given a new prison sentence with another specified period of supervised release to follow.

At the time appellants committed their crimes a violation of supervised release could result in 1) the period of supervised release being extended, or 2) the release being revoked and a prison term imposed, or 3) home arrest. The law did not allow a combination of more supervised release and a prison term. The law was amended to allow imposition of both additional prison and additional supervised release after a violation of supervised release.

The application of the new law to these defendants, imposing both prison and supervised release after committing an infraction of supervised release, violated the *ex post facto* clause of the constitution. It both applied the amendment to events occurring before it was enacted, and disadvantaged defendants by making punishment for their crimes "more burdensome" after they were committed. This newly sanctioned combination of punishments created potential sanctions that exceeded the

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maximum of what they could possibly receive when the original crimes were committed. The new law created the possibility of repeated cycles of prison and supervised release not possible before. This court affirmed the prison sentences imposed, but reversed and ordered vacated the additional supervised release terms.

United States v. Ooley, 116 F.3d 370 (9th Cir. Cal. 1997)

Ooley was on probation for a state felony, and as part of probation signed terms agreeing to consent to a search of his person, property, residence, vehicle, and personal effects at any time without a warrant, without reasonable cause when required by the probation officer or other law enforcement officer. While on probation Ooley was arrested for burglary after a car chase, and his truck yielded burglary tools, weapons and ammunition. Police then did a warrantless search at his home, finding another pistol and bullets. The state police called in ATF, which resulted in a federal prosecution for being a felon in possession of a weapon and ammunition. Ooley filed a motion to suppress the evidence as the result of an illegal warrantless search not sanctioned by his probation waiver of Fourth Amendment rights. He pointed out that the search was for an investigation and not connected to probation. The lower court denied the motion without a hearing.

First deciding that federal law would control the validity of the warrantless search, this court remanded for the court to hold an evidentiary hearing. The legality of a warrantless search of a probationers home depends on whether it is truly for probation purposes. Though the search need not be initiated or conducted or supervised by a probation officer to be a valid probation search, it may not be a "mere subterfuge" to allow police to avoid getting a warrant.

United States v. Garcia-Barron, 116 F.3d 1305 (9th Cir. Cal. 1997)

CAR SEARCH AND SEIZURE

A Border Patrol checkpoint is set up 50 miles north of Mexico in California. Secondary local roads provided a way to avoid a checkpoint on the main highway by getting off the main road south of the checkpoint and returning once the area was past. The side roads also led to several trailer parks and spas, which were mostly occupied by retirees who did not create much traffic in the middle of the night. A 3:00 a.m. a border patrol agent decided to follow a car that turned off onto the side road before it reached the checkpoint. The license plate came back to a rental company near L.A. The preceding days had seen higher than usual arrests for alien smuggling on the back roads The agent's experience of two years was that the majority of rental cars stopped there were occupied by someone found committing immigration violations. The agent stopped the car although it might have still been headed to the last remaining trailer park at the end of the road, where it dead ends. The driver, Solis Gonzalez (Driver One) claimed to be a U.S. citizen on his way to pay a truck driver in a nearby town, but he didn't know the driver's name or where they would meet. He had a U.S. passport, a pager and cell phone.

While stopped with Driver One the agent noticed people in a passing van duck down when he flashed his light at it. Leaving Driver One with no restrictions, the agent and a back-up followed the van and stopped it back on the highway north of the checkpoint. The van was rented from the same rental company as the car, at a branch 20 miles from the first rental's location. Inside the van were 28 people and Garcia-Barron (Driver Two) spread eagled over them. While dealing with the van, Driver One drove past the agents, obviously having not stopped at a destination off the main road, but having avoided a portion. Further records checks had revealed that he was a previously deported Mexican citizen and he was stopped and arrested.

DRIVER ONE

A motion to suppress claimed that the stop was illegal. The Border Patrol needs "reasonable suspicion" to stop a vehicle. Factors the court considers for Border Patrol stops include the area, proximity to the border, usual traffic patterns, previous alien or drug smuggling in the area, behavior of the driver including attempts to evade law enforcement, type and appearance of car, the officer's experience. This is a non-exhaustive list.

Conceding that there was nothing suspicious about the type of car, manner of driving or the driver himself, the court upheld the lower court's denial of the motion, as the factual findings were not "clearly erroneous." Factors providing reasonable suspicion were the time of day, apparent attempt to avoid the checkpoint, failure to head most of the innocent destinations along the road, the officer's experience in stopping rentals and the history of smuggling in the area, and the lie about citizenship.

The arrest was challenged as lacking probable cause. This too was rejected, relying on all the factors previously catalogued, and the fact that the checkpoint had

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proximity of the car rental offices and coincidence of being on the same sparsely traveled roads at 3 a.m. also built towards probable cause that driver One was involved in smuggling the aliens in the van.

DRIVER TWO

A motion to suppress the stop was unsuccessful. The roads were known to be used to avoid the checkpoint, the van was traveling at an hour not usual for the legitimate business of the area, the occupants ducked to avoid being in the flashlight beam, and the van was rented from the same agency as One's car, which was nearby with communication equipment, suggesting it was scouting for the van. [check Ogilvie 527 F.2d 330 distinguished in footnote]

United States v. Lacy, 1997 U.S. App. LEXIS 17067

PROBABLE CAUSE FOR WARRANT

Appellant was convicted of possessing child pornography based on computer records and images. He challenged the search warrants and seizure of the computer, discs, etc. This motion was denied. The fact that he had ordered child pornography was insufficient by itself to establish probable cause to believe he possessed it. Information that he had actually downloaded such images provided sufficient p.c. that he possessed it at some time. Because of this information, there was a basis to consider the further information in the affidavit for warrant that discussed the habit of child pornography collectors to value it highly and keep the material for long periods of time. This in turn helped defeat Lacy's claim that the four month old material was too stale to form p.c.

JURY INSTRUCTIONS

Lacy also argued that the jury instructions required reversal because they allowed a conviction without proof of *mens rea* and without proof of the jurisdictional element, interstate commerce. The statute forbade:

> Knowing possession of 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that [has been in, or produced with materials in interstate commerce] if; 1) producing such visual depiction involves the use of a minor engaging in sexually explicit conduct and 2) such visual depiction is been successfully avoided. The cell phone, pager, of such conduct.

The government must prove knowing possession of the "books, ...or other matter" and knowledge that those items contain a visual depiction of a minor engaging in sexually explicit conduct. Next the court interpreted the words "matter" and "contain" as applied to the computer hard drive, discs and files. What Lacy downloaded onto his hard drive and discs were six picture files known as GIFs ('graphic interface format' used to store such visual information as photos). The government was distinguishing between the hard drive and discs that contain the files, and the GIF files themselves that contain the visual depictions. The court concluded that "matter" meant the hard drive and discs, by comparing this situation to the way in which a book "contains" pictures. The defense was, lack of knowledge that the depictions were on his hard drive and discs, having deleted them.

The instructions merely required that Lacy 1) knowingly possessed "the matters charged" and 2) those "matters" contained a visual depiction of a minor engaging in sexually explicit conduct. This instruction failed to require that Lacy know the "matters" contained such a depiction, and was error.

Poland v. Stewart, 117 F.3d 1094 (9th Cir. 1997)

Poland and his brother elaborately planned the armed robbery of an armored car. In the course of the crime the two drivers were murdered in 1977. Poland was convicted of some federal charges, then tried in Arizona for state charges. His first conviction was overturned on appeal. He was again convicted and given the death penalty. His second set of appeal and PCRs were unsuccessful in Arizona state courts. This opinion deals with Poland's appeal from the federal district court's denial of his petition for writ of habeas corpus. The decision denying the petition is affirmed.

SUPREMACY CLAUSE

While serving his federal sentences (totaling 100 years) Poland was transferred to state custody for prosecution, and he has remained in state custody ever since. He argues that the Supremacy Clause, separation of powers, and the Fifth, Eighth and Fourteenth Amendments prevent his execution by Arizona before his federal sentences expire. The U.S. Attorney General, on behalf of the "sovereign with priority of jurisdiction" may waive the right to exclusive custody of a prisoner to a state for purposes of "vindication of its laws" in a criminal

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prosecution. The A.G. has authority to leave him in state custody. The court does not decide whether Poland has standing to challenge this decision, although it suggests he may not.

PECUNIARY GAIN

In 1977 aggravating factors to consider in a potential sentence of death were:

> 1. Defendant procured the murder by payment, or promise of payment of anything of pecuniary value and/or
>
> 2. Defendant committed the offense as consideration for receipt, or expectation of receipt of anything of pecuniary value.

By the time of the first trial the only application of these provisions had been to murders for hire. Before the second trial this interpretation was rejected and the pecuniary gain factor was applied to situations where the defendant expected to end up with something of value, perhaps through life insurance, inheritance, or by taking the victim's property. Poland here claims that a due process counterpart to the *ex post facto* clause prohibits this retroactive application of the enlarged interpretation. This argument is rejected, as the current interpretation was not unforeseeable and the wording of the statute gave fair warning of the broader construction.

REWEIGHING SENTENCING FACTORS

Poland apparently claims that the Arizona Supreme Court did not perform the independent reweighing of all aggravating and mitigating factors that is required. But that Court did set aside one aggravating factor, affirm another, and specifically discussed each of the mitigating factors Poland claims exists, and affirmed the death penalty. The reweighing was performed as required.

DOUBLE JEOPARDY

Poland claims that double jeopardy precludes a imposition of the death penalty using the finding of pecuniary gain where the first sentencing judge specifically found that pecuniary gain did not apply. The court was not collaterally estopped from either finding that factor present nor reimposition of the death penalty. The failure to apply pecuniary gain the first time was the result of error. In addition, a trial court's failure to find that an aggravating factor exists will not always be an 'acquittal' of that factor.

CHANGE OF JUDGE

Upon remand after winning the first appeal the case was assigned to the same trial judge. The county attorney moved to dismiss without prejudice, saying there was insufficient evidence to proceed. When this motion was denied, a Rule 10.2 c.o.j. (on demand) was untimely, so they also moved for a change under Rule 10.1, claiming the judge was biased. The claimed basis of the bias and appearance of prejudice was the denial of the motion to dismiss. The presiding judge reviewed a transcript of the proceedings on that motion and found that there was no hostility or prejudice exhibited in the trial court's ruling. Opinions formed on the basis of facts learned in the course of the case generally do not show bias or partiality, nor are the judge's positions on legal issues.

LETHAL GAS

Because of the date of his sentence Poland may choose gas as a method of execution, or if he does not choose, lethal injection will be used. He claims that use of gas is cruel and unusual punishment under the Eighth amendment. This claim is not ripe, and need never be. Poland has not chosen it as a method of execution, and need not ever risk execution by this method. The court does not decide this issue.

LETHAL INJECTION

Poland claims that the subsequent (to his sentence) enactment of the legislation allowing use of lethal injection, and giving him a choice of methods violates the *ex post facto* clause by enlarging the penalty. This is rejected, as he need not choose, and the default provision will make the choice of injection for him. Second, the change in the method of carrying out the sentence does not make the sentence more burdensome.

Poland claims lethal injection is cruel and unusual punishment. None of the executions he points to as evidence of this were performed in Arizona, nor did they use the protocol used here. The court notes *sua sponte* that there have been Arizona executions by injection and no claims of botched administration.

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Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997)

Anti-Terrorism and Effective Death Penalty Act of 1996 provisions barring second or successive petitions for habeas do not apply to a petition raising only a claim that a prisoner is incompetent to be executed. In the course of a later proceeding denying other relief, the court assured appellant that the competency claim was not barred as a second or successive petition.

Appellant, under an Arizona death sentence, filed for habeas in federal district court, including, among other claims, that he was incompetent to be executed. This claim was dismissed w/o prejudice as premature. When the issue was again before that court it claimed that AEDPA deprived it of jurisdiction to hear any second petitions raising competency to be executed. This court holds that to be error, pointing out that a question of competency can only be made when execution is imminent, obviously after other claims have been litigated. The language of the act seems to preclude review by making it impossible to litigate this issue in a manner both timely and when ripe. This court avoids resolving this problem by finding a different label for this claim than "second or successive petition." The opinion assures that such claims will be considered even if previously dismissed without prejudice or as premature. The Court avoids deciding that AEDPA in this situation unconstitutionally suspends the writ of habeas corpus as to competency, although the concurrence would make that finding.

United States v. Beydler 1997 U.S. App. LEXIS 18187

Statement of unavailable witness was not admissible under hearsay exception as against penal interest where made specifically to help declarant secure more lenient treatment. The self serving purpose taints reliability. Admission under Federal Rule of Evid. 804(b)(3) was an abuse of discretion and violated the Sixth Amendment right to confrontation.

United States v. Makowski 1997 U.S. App. LEXIS 20876

Hate crime statute not void for vagueness. The law provides that one who "by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with. . . any person because of his race, color, religion or national origin and because he is or has been . . . participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof" is guilty of a racially motivated assault. The "willful" element eliminates any vagueness problem.

The victim was born in Mexico of Hispanic origin. He was jogging in a public park when three boys on bicycles twice almost ran him down. He shouted for them to stay away from the track or he'd "kick their ass" if they hit him. The defendant was the father of one of the boys. Upon hearing theses facts he sped to the park in his car, with his son, and quickly approached the victim who was with his child at a playground area. Defendant began to attack the victim while swearing and calling him a "goddamned Mexican" and "wetback." He also yelled that the victim "should go back to [his] country; white men were there first; this was a white man's park; I'll kill you right here you f--g Mexican; no stinking Mexican tell my kids what to do" while punching and choking the victim. There were additional similar words even after others approached, and defendant challenged them to fight also. Defendant appealed the sufficiency of the evidence, claiming it was insufficient to prove he attacked with the specific intent of depriving the victim of the use of the park due to race. Conviction affirmed.

Turner v. Marshall 1997 U.S. App. LEXIS 19483 7-29-97 nelson

BATSON ALIVE IN 9TH CIRCUIT for now, anyway.

At voir dire defense counsel struck 2 black men among his 19 strikes. The state struck 5 blacks in 9 peremptories, leaving 4 black women but no black men once the jury was seated. Defense made a Batson challenge but the trial judge found no pattern of discrimination and refused to ask the state for an explanation. In post conviction proceedings defendant was finally got a ruling that he had established a prima facie case of racial discrimination in jury selection. At the evidentiary hearing just over 6 years after the fact, the prosecutor stated she had no independent recall of the 5 stricken black jurors, but was assisted somewhat by a transcript and her notes.

One black man the state struck "possesses all of the attributes of a classic prosecution juror." He was an M.P. in Vietnam, married with children, worked for an aerospace firm, had an in-law with the DEA but indicated he "really wouldn't want to see" gory photographs. He agreed he would view them if he was a juror. The state inquired into this juror's feelings on the topic because of a facial expression. The strike was defended by claiming that the juror's "squeamishness" was at odds with his

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military background. This was the only excuse proffered as a nondiscriminatory basis of the peremptory. The court therefore looked at the rest of the jurors' responses for a similarly situated non-minority who was not challenged. The state did not strike a white woman who "would have a problem looking at gory pictures . . . [and was] very squeamish about that type of thing." When asked if she would or could do so if selected, this juror said she "probably could but it would be really uncomfortable." When pressed about the ability to examine such evidence she said "I guess."

On the basis of the Batson challenge that should have yielded at least further inquiry, this court found racial discrimination, and granted a new trial. *Purkett v. Elem* was mentioned only in a footnote, pointing out that here there was no contemporaneous explanation and judicial acceptance of such excuse as plausible and sincere, and so no decision to which deference was due. The fact that other minority jurors were on the panel does not salvage a racially motivated strike.

Perez v. Marshall, 1997 U.S. App. LEXIS 18186

After hearing evidence on multiple counts of robbery and assault, a state jury deliberated for one half hour before a juror sent out a request to speak with the judge. *In camera* Robles, a 20 year old juror, said that she had a reasonable doubt as to guilt, but all others had voted guilty and told her they would change her mind, and one "yelled at her." She described the jurors as "mad at each other . . . stressing out . . . upset." When the judge asked if she was willing and able to continue, she said no, she did not want to. The judge explained a bit about a juror's duty. Robles asked what happens if she's a lone holdout, does she "stick that way?" to which the court answered yes, if she believed she was right. When Robles asked "what if I'm wrong" the court suggested she just try to continue with deliberations. Robles expressed discomfort with deciding the fate of someone who could go to jail, and would feel sorry for the defendant even if he was guilty, but worried that a wrong decision would result in other victims. She cried during this discussion. Finally, after a break she agreed to resume deliberations. Shortly after she rejoined the others the foreperson called a halt due to unspecified problems.

The jury was excused for the day, except Robles who told the court that one lady was mad at her because she'd been persuaded to vote guilty, then changed her mind. Robles now indicated that she had been prepared to continue deliberating and had not refused to discuss the case. She agreed with a suggestion that she was unable, emotionally, to continue. The court excused her for the day without deciding what to do. The next morning the foreperson was questioned by the judge. She said that Robles had agreed on one count, then changed her mind, describing the events as "a very emotional thing . . . no one could try to make an intelligent decision . . . dealing with somebody . . . in pieces." She did not think the jury could continue with Robles. Robles herself still said that she would continue although she did not want to and it would be very emotional. The judge noted, after Robles' departure, that her physical appearance revealed an "emotional wreck . . . tentative..coerced, willing to do what she is forced to do . . . emotionally out of control." He then excused Robles for good cause, under a California statute, and substituted an alternate. Deliberations started over, and resulted in five guilty verdicts and some other hung counts. The defendant's objection to her removal and his motion for mistrial (rather than substitution of the alternate) were denied.

The California law allowing for removal and replacement of a juror for good cause is constitutional on its face, and there was good cause demonstrated. Nothing in the record suggested that the dismissal was motivated by the juror's inclination to acquit. The law and actions of the court did not violate defendant's Sixth amendment right to trial by an impartial jury. The dissent has some good language and arguments suggesting that where the juror's disability to continue is caused by her opinion of the evidence, and all parties know who is the holdout for acquittal, the removal of that juror and continuation of deliberations suggest to the rest of the jury that the court supports the majority position. (And all this before Symington's fiasco)

United States v. Hay, 1997 U.S. App. LEXIS 21864 8-19-97
RECESS OF TRIAL, HEARSAY

Hay designed, ran and administered health benefit plans. He made false claims to customers regarding the extent to which he insured the funds available to pay any claims. He also secured false representations of an insurance company, CBL, to present to selected customer of his health plans. The president of the insurance company gave such false assurance of full coverage to the state agency that began investigating Hay's business, thereby stalling the investigation for a while. Eventually the investigation resumed, causing CBL to close and Hay to file bankruptcy for his company. He was indicted on seven counts of mail fraud, with the president of CBL as codefendant in five counts.

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Their joint trial began on Feb. 28, 1995, with the parties expecting to end on April 28 that year, including numerous breaks for other court business. Sometime in April one juror was excused for injury, leaving one alternate. On May 30, 1995 the codefendant's motion for directed verdict was granted as to four of his five counts. The next day the judge commented on the slow pace of Hay's direct examination and his lawyer's lack of organization, and ordered the defense to finish direct in 2½ hours on the next trial day, June 6. The court received notes indicating two jurors had scheduling conflicts because of the unanticipated length of the trial. One juror would be gone from June 21 -July 7 and another from July 11 to July 25. The judge expressed concern that the trial would lose too many jurors. The codefendant agreed to proceed with eleven jurors if necessary, and to waive his closing argument to save time and avoid a long recess. The government agreed to having eleven jurors. Hay would not stipulate to eleven at that time.

In mid June the judge suggested the need to recess to the second week of August. Hay moved for a mistrial, which was denied. On June 20 Hay announced his willingness to waive one juror. The judge decided to recess anyway. The recess spanned June 20 (the close of evidence) to August 7, 1995. On the latter date trial resumed with closings. The jury deliberated for 5 days, hung on the remaining count against the codefendant and one of Hay's charges but convicted Hay of 6 counts.

The unprecedented length of the recess presented a "probability" of prejudice "inherently lacking in due process" (as opposed to a showing of actual prejudice usually required). The recess created a danger that some relevant matters in the complex, technical evidence was forgotten, and of improper outside influences. It was an abuse of discretion to order the recess, and required reversal.

The court also would have reversed one count on improper admission of the codefendant's hearsay against Hay. An investigator testified that the president of CBL admitted to an investigator that he wrote the false letter assuring that CBL fully insured the funds "because Henry Hay asked me to." Hay objected at this point, and asked for a limiting instruction so that this would not be admissible as to Hay. The objection was overruled, and no admonition given. This was reversible error, not harmless error on the count involving this false statement.

United States v. Rudberg, 1997 U.S. App. LEXIS 21198 8-12-97

Rudberg was one of at least nine people charged in a meth conspiracy. At the start of trial his attorney disclosed in opening that numerous witnesses had made deals and were getting a benefit from cooperating with the prosecution under a federal rule 35(b). This rule provides that upon government motion after sentencing, the court can reduce a sentence in return for "substantial" assistance to the government. This assistance is generally provided as part of an agreement, not on spec, or out of the goodness of the felon's heart. The federal agent professed to be unsure of how this rule worked when asked by defense counsel.

On redirect the agent testified that information provided by certain witnesses (the Maeses) naming Rudberg as the supplier did in fact constitute "substantial assistance" and was "very accurate." Two other customers testified under grants of immunity. The prosecutor propounded question for four 'co-defendants' that established their cooperation and assistance, and bolstered their credibility. In this method they testified that: they had entered into agreements to provide truthful testimony; they would get a reduction in sentence if substantial assistance was given; the motion to reduce sentence depended on truthful information; each had received or still was awaiting such reduction. One testified to a previous unsuccessful attempt to get a Rule 35 reduction on an unrelated sentence that failed because he was not fully truthful then. He had "learn[ed] a valuable lesson. . . . That the truth's going to come out. . . . And lying just wasn't going to get me anywhere." None of these comments were objected to. In closing the prosecutor admitted that to begin with there was a weak case against Rudberg for the conspiracy counts. He explained how Rule 35 is a tool that makes people like the witnesses give up the key to convicting dope dealers, and argued they "came here to tell you all about the drug conspiracy. . . . [C]ame here to tell you the truth. . . .

The court had to determine if vouching occurred. The court found almost every factor set out in prior case law pointing to the existence of prosecutorial vouching occurred here. The testimony and argument inferred that the prosecution and courts in fact verified and monitored the truthfulness of these witnesses, and they had been found truthful. The prosecutor's personal opinion was expressed, the vouching infected the trial from the outset, the witnesses involved were critical to conviction, and the vouching bolstered their credibility. Although all but one

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witness' credibility was effectively challenged by cross examination, the vouching did materially affect the jury's ability to judge the evidence impartially. Because there were no objections the review standard was "plain error" or "highly prejudicial error affecting substantial rights." The convictions were reversed.

Falcone v. Stewart, 1997 U.S. App. LEXIS 21485 8-14-97

Falcone entered two guilty pleas in Maricopa County Superior Court, apparently simultaneously, on two unrelated cases. The plea in case No. 1 stipulated lifetime probation and no prison. Case No. 2 had no sentencing stipulations. It appears that the judge confused the intended sentences for he imposed prison plus probation on Case #1, and probation on Case #2. Falcone filed, then wisely dismissed an appeal of the sentence of probation.

In the appeal of Case #1 the sentence was found illegal, the appellate court held that the cases were consolidated for sentencing purposes and remanded for resentencing in both. Falcone was then sentenced to probation in Case 1, and ten years DOC plus probation in Case 2, reversing the sentences originally imposed. (It appears that Falcone secured relief on **state appeal** from two plea agreements by winning a new sentencing proceeding. Falcone then challenged the subsequent sentencing apparently by **PCR**, appeals from a plea being abolished in the meantime.) On habeas the federal district court affirmed and held that the pleas were "part of a package [with] an intent for petitioner to receive a ten year sentence plus lifetime probation."

This conclusion, even if true, did not eliminate or avoid the double jeopardy violation. Arizona prosecutors cannot appeal a lawful sentence, nor can a court *sua sponte* modify one. The sentence in Case #2 (no stipulations, probation granted) was lawful, and the appeal dismissed. No court order ever consolidated the cases, even for sentencing. There were merely consolidated court dates for convenience. The cross-references to each case in each plea, running sentences consecutive to each other [sic] did not show a package or consolidation. The prosecutor testified as to his intentions, and understanding of the terms as they were written. The fact that error benefited the defendant and frustrated the intention of the state did not lessen the double jeopardy violation. There was a legitimate expectation of finality in the first sentence to probation in Case #2. (So I'm guessing he did not file a PCR or appeal from Case 1 after the second sentencing). ■

ARIZONA ADVANCED REPORTS
A Summary of Criminal Defense Issues: Volume 248-249

By Steve Collins
Deputy Public Defender-Appeals

In re Sean M. 248 Ariz. Adv. Rep. 38 (CA 1, 7/24/97)

A juvenile was adjudicated delinquent of "attempted" child molestation. The Court of Appeals held the juvenile court correctly ordered sex offender registration, pursuant to the statute governing registration of sex offenders, rather than the statute governing community notification.

It was further held it was proper to order DNA testing of the juvenile. DNA testing applies to "attempted," as well as completed sexual offenses.

***State of Arizona v. Superior Court (Tibshraney)*, 248 Ariz. Adv. Rep. 30 (CA 1, 7-22-97)**

In order to determine whether a defendant has a right to a jury trial, Arizona courts apply a three part test. The courts must consider "the severity of the penalty inflictable, as well as the moral quality of the act and its relation to common law crimes." "Each prong of this test is independently sufficient to trigger the right to a jury trial."

The defendant was charged with contracting without a license, a class 1 misdemeanor. A potential sentence of six months in jail and $2,500 fine did not entitle him to a jury. The Court of Appeals found *Frederickson v. Superior Court*, 187 Ariz. 273, 928 P.2d 697 (App. 1996), misstated the law on this issue.

Maricopa County Juvenile Action No. JV-512490, 248 Ariz. Adv. Rep. 31 (CA 1, 7/22/97)

A juvenile's parents had a dispute with a neighbor over an easement to use the neighbor's driveway. The juvenile's family claimed it had a right to use the driveway to access it's horses pastured on nearby property. The neighbor put up locked gates on the driveway and had the juvenile arrested when she climbed over the gate and walked down the driveway after seeing the family's horses.

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The juvenile was adjudicated delinquent of criminal trespass. The Court of Appeals chastised the court commissioner who heard the case and the state for bringing the action. The Court of Appeals found it was an abuse of the penal statutes to try disputed property rights in juvenile court.

***State v. Acinelli*, 248 Ariz. Adv. Rep. 35 (CA 1, 7/24/97)**

The speedy trial rights in, Arizona Criminal Procedure Rule 8, require a defendant to be tried within 150 days of his or her "arrest or service of a summons." This rule no longer requires the time to run from when the indictment is issued. The Court of Appeals found that, even if the time limits had been exceeded, the state exercised due diligence in attempting to arrest the defendant who was in California. DPS officers had contacted police in California and asked them to execute the arrest warrant.

A highway patrolman received an "attempt to locate" broadcast for a vehicle that might contain drugs. The patrolman happened to locate the vehicle at the same time as the driver was committing an unsafe lane change. Thus, the driver was stopped.

The officer issued a warning ticket and then asked the driver if he could search the vehicle. The search produced drugs. The Court of Appeals held the search was consensual because a "reasonable person" would have felt they were free to leave at that point.

The defense was the officer planted the drugs and defense counsel requested the prosecutor to check the officer's personnel file to see if there were previous allegations of such conduct. The Court of Appeals noted a split in the jurisdictions on this issue, but held a showing of materiality must be established before a prosecutor will be required to review a police personnel file.

***State v. Beltran*, 248 Ariz. Adv. Rep. 33 (CA 1, 7/24/97)**

The defendant was convicted of transportation and possession of marijuana for sale. As part of the sentence he was fined $110,000 and a $64,900 surcharge was imposed. A.R.S. Sections 12-116.01(D) and 12-116.02(D) permit the trial judge to waive the surcharge if payment would work a hardship on the defendant or his immediate family. Defense counsel did not request a "hardship waiver" at sentencing.

The Court of Appeals held the defendant's undisputed indigency required the surcharge to be waived. The issue was not waived on appeal.

In re John C., 249 Ariz. Adv. Rep. 65 (CA 1, 8/7/97)

A juvenile was found in violation of probation for running away from a facility designated by DES, his legal custodian. The requirement that the juvenile reside at the specific facility had not been reduced to writing.

State v. Robinson, 177 Ariz. 543, 869 P.2d 1196 (1994), holds a probationer may not be found in violation of a term of probation not reduced to writing. However, the Court of Appeals distinguished *Robinson* by finding the juvenile was directed in writing to follow the directives of DES.

The Court of Appeals held *Robinson* only applied to directives by probation officers. "The distinction between the guidance of a probation officer and that of a custodian is critical; the former advisor possesses less legal authority than the latter, making the requirement of Rule 27.7(c)(2) of specific direction appropriate because of legal status and responsibility." Therefore, it was held the juvenile was properly found in violation of probation.

***State v. Henry*, 249 Ariz. Adv. Rep. 68 (SC, 8/7/97)**

In a death penalty case, on a motion to change the judge for cause, defense counsel stated he did not want the defendant to testify. The trial judge then denied the defendant's request to testify at the hearing. The Arizona Supreme Court found the defendant failed to provide any support in the record on appeal for the claim of bias by the trial judge. Therefore, it was held there was no prejudice in precluding the defendant from testifying.

"Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." "Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display."

The issue of the defendant's right to self-representation at sentencing was waived on appeal because the defendant failed to make an "unequivocal" request to represent himself.

(cont. on pg. 18)

"As a matter of public policy, a defendant's filing of a bar complaint against his attorney should not mandate removal of that attorney . . . A rule to the contrary would encourage the filing of such complaints solely for purposes of delay."

"A 25 year-old prior armed robbery conviction was properly used as an aggravating factor in this death penalty case. A.R.S. Section 13-703(F)(2) does not have a time limit for prior felonies involving the use or threat of violence. The prior felony conviction was not too remote.

The disparity between the sentences of the defendant and his co-defendant, who plea bargained, was not a mitigating circumstance. Neither was the defendant's claim he was a model prisoner.

***State v. Hussain*, 249 Ariz. Adv. Rep. 6 (CA 1, 7/29/97)**

The defendant told the police he awoke and found a stranger standing in his motel room. When this man threatened the defendant with a knife, a struggle ensued and the stranger was stabbed with the knife.

The trial judge gave a self-defense instruction but refused to give instructions on justification for crime prevention under A.R.S. Section 13-411(A); justification for defense of premises under A.R.S. Section 13-407; or justification for defense of property under A.R.S. Section 13-408. The Court of Appeals held refusal to give instructions on defense of premises and defense of property was not reversible error because they were adequately covered by the self-defense instruction.

It was reversible error not to give the crime prevention instruction. The defendant's version of the incident provided "the slightest evidence" necessary to support the theory. Under 13-411(A) a person living in a motel room is afforded the same protection as a person living in a house.

The crime prevention statute differs from the self-defense statute, in that it permits a person to employ deadly physical force "if and to the extent the person reasonably believes it is immediately necessary" to prevent the commission of any of several enumerated crimes, rather than only in response to another person's use or attempted use of unlawful deadly physical force. In addition, a person is presumed to be acting reasonably if he or she is acting to prevent the commission of any of the offenses listed in 13-411(A). Thus, the self-defense instruction given to the jury in this case did not adequately cover the requested instruction based on 13-411(A).

***State v. Mussler*, 249 Ariz. Adv. Rep. 12 (CA 1, 7/29/97)**

In 1994, the defendant telephoned the office of the Chief Justice of Arizona to complain about an adverse experience in a justice court. Dissatisfied with a law clerk's response, the defendant ended the conversation by stating he "might just have to show up on a judge's doorstep, and discuss the matter at gunpoint." The defendant was prosecuted, tried, and convicted in justice court on one count of using a telephone to intimidate, a class 1 misdemeanor.

A.R.S. Section 13-2916, using a telephone to intimidate, originally targeted the "invasion of privacy that arises when a defendant initiates a threatening telephone call." A 1978 amendment to the statute improperly broadened the statute to prohibit even protected forms of speech. Therefore, the statute is void for overbreadth. The Court of Appeals felt it was improper to try to save the statute by narrowing its construction.

Courts generally decline to confer standing on litigants who challenge a statute only "on grounds that it may conceivably be unconstitutional when applied to others." The Court of Appeals notes this stringent standing rule is relaxed in cases that challenge statutes with significant potential to constrain freedom of speech under the First Amendment.

***State v. Ramirez*, 249 Ariz. Adv. Rep. 16 (CA 1, 7/29/97)**

Defendant was convicted of first degree murder. It was reversible error to give an instruction that premeditation may be as "instantaneous as successive thoughts in the mind." It was especially prejudicial because the instruction omitted balancing language from the RAJI instruction that "an act is not done with premeditation if it is the instant effect of a sudden quarrel or heat of passion."

The prosecutor argued to the jury that premeditation does not require actual reflection but merely "a length of time to permit reflection." The trial judge refused to give an instruction correcting this misstatement of the law. Therefore, "the verdict merely establishes that an instant of time existed between Appellant's knowledge and his action." This is insufficient to support a finding of premeditation for first degree murder.

(cont. on pg. 19)

***State v. Supinger*, 249 Ariz. Adv. Rep. 9 (CA 1, 7/29/97)**

The defendant was convicted of child molestation and sexual conduct with a minor. After telling the police she had been molested, the alleged victim recanted her allegations.

At trial, on direct examination, the prosecutor asked a police detective about a conversation in which the alleged victim's mother said she did not believe her daughter. The Court of Appeals held this hearsay was properly admitted under Arizona Evidence Rule 801(3) which permits hearsay concerning a "then existing mental or emotional condition." The Court of Appeals stated the parent's disbelief of a child's allegation was a factor which could cause a false recantation, thus making the mother's state of mind relevant.

Under A.R.S. Section 13-604.01, dangerous crimes against children, the child molestation count against the defendant comes within an exception which allows for concurrent sentences. However, there is no exception for the sexual conduct with a minor count. Therefore, the sentences have to be served consecutively.

***State v. Thompson*, 249 Ariz. Adv. Rep. 23 (CA 1, 7/29/97)**

As the jury panel was coming up the elevator to start jury selection, the defendant asked the trial judge to represent himself. The Arizona Supreme Court has held a motion for self-representation is timely if it is made before the jury is empaneled. The Court of Appeals held that, although the motion was timely, it was properly denied because the motion was made for the purpose of delay.

The prosecutor exercised a peremptory jury strike to remove an African-American panelist. The Court of Appeals held the defendant failed to establish a prima facie case of purposeful discrimination as required by *Batson v. Kentucky*. Another African-American panelist went unchallenged by the prosecutor and served on the jury.

On the first day of trial, the defendant disclosed a new witness. The Court of Appeals held it was within the trial judge's discretion to preclude this witness from testifying. The disclosure was found to be untimely, and it was found that the prosecutor was surprised by the divulgence of the witness.

***State v. Trachtman*, 249 Ariz. Adv. Rep. 25 (CA 1, 7/31/97)**

The defendant was repairing and restoring vehicles on his property in Carefree. He was convicted of violating criminal zoning laws which prohibited such activities. As his activity was clearly covered by the zoning laws, he had no standing to challenge the ordinances as unconstitutionally void for vagueness. The definitions of "home occupation" and "accessory use" in the zoning ordinances were not unconstitutionally vague. ■

COMPUTER CORNER

By Susie Tapia
Information Technology

New Addition
Please welcome our newest member of the Information Technology's Staff, Howard Elliott. Howard started with the Public Defenders Office on September 15 as a Systems Administrator/Help Desk Technician. Howard will be manning our Help Desk, teaching classes, helping with computer installs, troubleshooting, and maintaining inventory.

Howard recently retired from the Military after 20 years of service. His experience includes, networking, teaching, pc troubleshooting, installations, and a help desk environment (just to name a few). Howard holds a B/A in Computer Science. He's also worldly - ask him about what countries he's been to!

Please stop by the I.T. department to introduce yourself and welcome Howard aboard!!

Records On-Line
After a long awaited period, the Records Department in the Luhrs building is on line. Their computers were installed this past month, replacing the "dumb terminals" they previously used to access the Vax (Inquiry system). In addition to the Vax system they also have access to GroupWise email, WordPerfect, and Internet. You can now contact Records by emailing them using your GroupWise email. Congratulations Records!

Looking for ShortCuts?
Flip-Its Available are: GroupWise Attachments, GroupWise Proxy, GroupWise Personal Groups and

(cont. on pg. 20)

GroupWise Archiving. Please contact the Help Desk at x6198 for a copy.

Is this you?

Contact the Help Desk to sign up for a training class. Learn some new techniques, shortcuts, or just add to your growing thirst of knowledge.

Help Desk - x6198 ■

BULLETIN BOARD

New Attorneys

Rickey Watson, a former Deputy Public Defender with this office, has decided to rejoin our ranks. Mr. Watson is a graduate of Arizona State University College of Law. He has over four years of experience as a public defender attorney, first with Pinal County and then with Maricopa County. In the last two and a half years, Mr. Watson has worked as an attorney for the Arizona Department of Juvenile Corrections and most recently as the supervisor of the charging unit for the Attorney General's Office of Guam. Mr. Watson will begin working with Trial Group A, effective September 22.

Victoria Washington has been assigned to group B, as an attorney, and will begin her duties once she is sworn in. She has been working as that group's law clerk.

Attorney Moves/Changes

Susan Corey, a trial attorney for group A, transferred to Juvenile/Durango, effective September 15.

Kristin Larish, a trial attorney in group B, resigned from the office, effective August 29.

John Movroydis, a trial attorney in group B, is resigning from the office, effective September 26.

Lisa Shannon, a trial attorney for group A, transferred to group C, effective August 25.

New Support Staff

Chris Doerfler, law clerk for group B, began working for the office, effective September 2.

Howard Elliott began working for our information technology department on September 15. He will be serving in a support and training capacity, specifically assigned to our "computer help-desk."

Bethanne Klopp-Bryant will become group A's law clerk on September 29.

Alice Magnin, legal secretary, began working with Group C, effective August 25.

Dolores Prieto, first floor receptionist, began working with the office, effective September 15.

Deborah Sparks, legal secretary, began working with Group C, effective August 25.

Jason Swetnam, office aide, began working for trial group B, effective August 27.

Lisa Tibbedeaux, sign language interpreter, began working for the office, with trial group A, effective September 22.

Support Staff Moves/Changes

Margi Breidenbach, group A's law clerk, will become that group's Client Services Coordinator, following Pam Davis's change of duties on September 29 to the new role of death penalty mitigation specialist.

Velia Ceballos has been selected for special duty assignment, effective September 22, as group D's lead secretary, succeeding Margaret Corona, who asked to relinquish that role after years of valuable service.

Matthew Elm, an office aide for group B, resigned from the office, effective August 29, to return to school.

Sherry Pape was selected for special duty assignment in July, as group A's lead secretary.

Kelly Plunkett, tenth floor receptionist, left the office, effective August 15, to return to school.

Stephanie Valenzuela, legal secretary for group D, resigned from the office, effective September 19, to join Commissioner McNally's staff. ■

August 1997
Jury and Bench Trials

Group A

Dates: Start/Finish	Attorney/Investigator	Judge	Prosecutor	CR# and Charge(s), Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
8/1	Tosto	Barclay	Reeves	CR96-00964; 3 cts. Interfer. Judicial Proc./cl 1 misd.	Guilty	Bench
8/4-8/6	Tosto	Gerst	Lynch	CR97-00417; Theft, cl. 3; Burglary Tools/F6; POM/F6	Not Guilty-Burg. Tools; POM Guilty - Theft / Motion for New Trial Granted	Jury
8/8	Townsend	Halstead	Lowenthal	TR97-02573; Misd. DUI	Hung	Jury
8/18	Tosto	Galati	Mroz	CR97-02656; 2 cts. Public Sex. Indecency/F5	Guilty	Jury
8/18	Passon /Yarbrough	Crumb	Reniccious	TR9610153;Misd. DUI	Guilty - 1 count; Hung - 1 count	Jury
8/20-8/22	Green	Sheldon	Eckhardt	CR97-02066; Agg. DUI w/1 prior/ F4	Not Guilty - Agg. DUI Guilty - Driving on Susp. License	Jury
8/21-8/27	Curry /Neus	Arellano	Armijo	CR96-03987; POND for Safe/F2	Guilty	Jury
8/22	Leal	Johnson	Sobalvarro	TR97-01608M; 2 cts.misd. DUI	Not Guilty - 1 ct. Guilty - 1 ct.	Jury
8/25-8/29	Farrell /Neus	Baca	Wendell	CR96-03984; 4cts. Agg. Asslt/F3	DV- 2 cts. Not Guilty - 2 cts.	Jury

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench/ Jury Trial
6/30-7/10	Lopez/ Castro	Hotham	Heilman	CR 94-06235 1 Ct. Sexual Abuse/F5 2 Cts. Sexual Assault/F2 DAC 1 Ct. Attempted Sexual Abuse/F6 1 Ct. Child Molest/F2 DAC 2 Cts. Sexual Conduct w/a Minor/F2 DAC	Guilty on all counts	Jury
7/22-8/8	Blieden/ Ames	Hilliard	Hoffmeyer	CR 96-06252 3 Cts. Child Prostitution/F2 3 Cts. Furnishing Drugs to a Minor/F2 2 Cts. Receiving the Earnings of a Prostitute/F5 1 ct. Possession of Marijuana/F6	Hung Jury on all counts. Defendant plead guilty to two counts of Attempted Child Prostitution, Class 3 felonies	Jury

7/29-8/6	Klapper/ Ames	Martin	Kelly	CR 95-11729 Kidnaping, Dangerous/F2 Aggravated Assault, Dangerous/F3 Sexual Abuse over 15 years/F5	Not Guilty - Sexual Abuse Guilty - Kidnaping and Aggravated Assault	Jury
7/30-8/4	Navidad	Arellano	Pappalardo	CR 96-11019 Forgery/F4	Guilty	Jury
8/11-8/11	McCullough	McClennen	Bustamante	CR 96-12677 POM/F6	Guilty	Jury
8/11-8/11	Gray, Y.	Skelly	Anthony	CR 96-13309 Possession of Dangerous Drugs/F4	Guilty	Bench
8/11-8/13	Kamin/ Ames	Wilkinson	Boyle	CR 96-13479 Theft/F3	Guilty	Jury
8/14-8/25	Brown, J./ Castro	Dunevant	Ainley	CR 96-05280 Drive by Shooting/F2 Aggravated Assault/F3	Mistrial	Jury
8/18-8/21	Lopez/ Corbett	Hotham	Schumacher	CR 96-11906 2 Cts. Armed Robbery, Dangerous/F2	Guilty	Jury
8/18-8/25	Gray, F./ Ames	McDougall	Vercautern	CR 97-01185 Aggravated Assault, Dangerous with two priors/F3	Guilty - Aggravated Assault, Non-Dangerous	Jury
8/20-8/25	Navidad	Arellano	Mitchell	CR 97-02888 1 Ct. Indecent Exposure/F6 2 Cts. Indecent Exposure/M1	Guilty	Jury

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
7/28 - 8/11	Cotto and Ramos Breen	Arameta	Gundacker Stelly	96-91917 Manslaughter, Dang/F2 2 cts. Agg Aslt Dang/F3 Theft/F3	Guilty Guilty Not Guilty	Jury
7/30 - 8/11	Mackey	Kamin	Craig	97-90271 PODD/F4 Resist Arrest/F6	Not Guilty Guilty	Jury
8/13 - 8/18	Rosier	Ishikawa	Stelly	97-90310 Agg DUI/F4 Agg Dr/BAC ov. .10/ F4	Guilty on both	Jury
8/18 - 8/21	Antonson	Dairman	Vincent	96-93392 Agg Aslt/F3 Kidnaping/F2	Dismissed w/o Prej. (The State was not able to produce the witness)	Jury
8/18 - 8/22	Nermyr and Leonard	Grounds	Perrin	97-90631 Agg Aslt Dang./F3 with 2 priors & on Parole Burglary/F3	Not Guilty on both	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
7/21-8/21	Nickerson and Hines/ Erb	Sticht	Garcia	CR 95-00851 1 Ct. Murder 1/F1 2 Cts. Child Abuse, Dangerous Crimes Against Children/F2	Not Guilty: Murder 1 Guilty: 2 Cts. Child Abuse/F5 (reckless)	Jury
7/28-8/15	Hoff and Leyh/ Bradley	Nastro	Lynch	CR 96-12840 Murder 2/F1	Guilty	Jury
7/25	Gavin	Gutirrez	Farnum	CR 96-0279 Assault, Misd. I.J.P, Misd.	Not Guilty on Assault Guilty on I.J.P.	Bench
7/31-8/5	Jung	Dunevant	Newell	CR 97-00818 Agg DUI X2/F4	Guilty	Jury
8/19-8/26	Carrion	Lewis	Cappellini	CR 96-13013 1 Ct. Agg DUI/F4 1 Ct. POM/F6	Guilty: both counts	Jury
8/18-8/21	Jung	Paddish	Newell	CR 97-00540 Agg DUI X2/F4	Guilty	Jury
8/19	Bevilacqua	Nastro	Wendell	CR 96-07933(C) Agg Assault/F3	Pled after Jury Selection	Jury
8/11 -8/12	Enos and Stazzone	Gerst	Hoffmeyer	CR 96-12030 1Ct. Child Molest/F2	Pled after Jury Selection	Jury
8/5	Dichoso-Beavers	Smith	Gerrity	MCR 97-00303 Disord/1JP/Misd.	Not Guilty	Bench
8/19	Berko	Dunevant	Linn	CR 97-02932 1 Ct. PODD/F4 1 Ct. PODP/F6	Mistrial	Jury
8/12-8/15	Silva, Margarita	D'Angelo	Petrowski	CR 97-03839 1 Ct. Resisting Officer's Arrest/F6 and 2 Cts. Aggravated Assault/F6	Not Guilty: Count 1: Resisting Arrest/F6; and Guilty: Counts 2 and 3: Aggravated Assault/F6	Jury
8/20-8/24	Korbin and Miller/ Bradley	Katz	Eliz. Freck	CR 97-12555 Pos. Cocaine for Sale, F2	Guilty	Jury
8/20	Zielinsky	Scrombelli	Lundin, A	TR 97-00908 DUI, DOSL, Failure to register Veh. In Arizona /Class 1 Misd.	Not Guilty: All counts	Jury

8/18 - 8/28	Stazzone	Gerst	Reuter	CR 95-02645 2 Cts. Child Molest/F2 4 Cts. Sex Assault/F2 5 Cts. Sexual Cndct W/Mnr/F4 1 Ct. Aggravated Assault (Dangerous)	Not Guilty: All Counts	Jury
8/27	Hoff	Lewis	Morrison	CR 97-02431 Agg DUI/F4	Dismissed w/o Prejudice	Jury
8/4-8/7	Brisson	Galati	Sigmund	CR 97-01566 Stalking/F5 Harassment, M1	Not Guilty: Stalking Guilty: Harassment	Jury

Office of the Legal Defender

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s) Class F/M	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench / Jury Trial
8/1-8/1/97	Alldredge	Nastro	P.Williams	CR 96-13241 Agg.Asslt, C6F	Guilty	Jury
8/13-8/22/97	Parzych/ L.DeSanta	Kamin	S.Kunkle	CR 96-90255 Ct.I: Agg.Asslt., C3D Ct.II:Agg.Asslt., C3D	Ct.I: Guilty L.I.O. Disorderly Conduct, C6D Ct.II:Not Guilty	Jury
8/19-8/26/97	Tate	Mangum	J. Hicks	CR96-12934 Agg. Asslt, C3D	Guilty	Jury
8/28-9/4/97	Parzych/K. Brandenberger	Ishikawa	L.Stully	CR 96-93216 2 Cts. Agg.D.U.I., C4F	Guilty	Jury
8/5-8/13/97	Orent/E.Soto	McDougall	G.McCormick	CR 95-02774 Ct.1: Armed Robbery, C2D C5.2: Agg.Asslt., C3D	Guilty	Jury

*
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Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. The Accused*, Defendant.	No. CR 97-* **SENTENCING MEMORANDUM** (Assigned to the Honorable Judge*) (Sentencing scheduled for *, 1997)

On *, defendant pled guilty/found guilty to Possession of a Narcotic Drug, a class 4 felony, committed on *. Accordingly, his sentence is governed by the terms of the newly enacted Drug Medicalization, Prevention and Control Act of 1996 (hereinafter referred to as "Proposition 200"). A copy of the full text of Proposition 200, along with the Analysis by Legislative Counsel is attached hereto as Exhibit "A."

The portions of Proposition 200 that apply to the situation are highlighted for the Court's convenience. Specifically, A.R.S. § 13-901.01(D) states:

> If a person is convicted of personal possession or use of a controlled substance as defined in Section 36-2501, as a *condition of probation*, the court shall require participation in an appropriate drug treatment or education program administered by a qualified agency or organization that provides such programs to persons who abuse controlled substances.

> Each person enrolled in a drug treatment or education program shall be required to pay for his or her participation in the program to the extent of his or her financial ability. (Emphasis added).

Subpart (E) goes on to explain:

> A person who has been placed on probation under the provisions of this section, who is determined by the court to be in violation of his or her probation shall have new conditions of probation established in the following manner: The court shall select the additional conditions it deems necessary, including intensified drug treatment, community service, intensive probation, home arrest or any other such sanctions short of incarceration.

It is defense counsel's understanding that Judge Reinstein has interpreted subpart (E) to allow the court to impose jail as an initial term of probation, because subpart (E)'s limitation on sanctions "short of incarceration" refers only to persons who have violated probation. Apparently, Judge Reinstein, believes that, since the statute is silent regarding jail as an initial condition of probation, the court can impose it. This, however, does not seem to be consistent with the legislation as a whole. If Proposition 200 does not provide for incarceration when a person violates probation, it would seem inconsistent that up to a year of jail can be imposed as an initial condition of probation.

The issue of a court's ability to impose jail as a condition of probation where the statute is silent concerning incarceration, has already been addressed by the appellate court. In *State v. Sirny* 160 Ariz. 292, 772 P.2d 1145 (1989), the appellate court ruled that a defendant sentenced under the original Domestic Violence Statute could not receive jail as a condition of probation. Though the statute read: "The term and condition of probation shall include . . . additional conditions and requirements which the court deem appropriate," the appellate court held that, if the legislature intends to include jail as a condition of probation, it must say so unmistakably.

The state also argued that Sirny could receive jail under A.R.S. §13-901, the general probation statutes. The appellate court found that the Domestic Violence Statute set out an *entire scheme for the*

disposition of eligible offenders. But the statute did not create a separate offense for which punishment could be imposed. Therefore, since the statute was ambiguous concerning jail as an initial condition of probation, the rule of lenity demanded that any doubt be resolved in favor of the defendant.

Proposition 200, like the statute in *Sirny*, sets out an entire scheme for the disposition of offenders. Any ambiguity concerning jail must be resolved in favor of the defendant.

Finally, this court should note that the Analysis by Legislative Council, which was part and parcel of the Proposition 200 pamphlet distributed to the voters, states that "*a person who is sentenced to probation does not serve any time in jail or prison*" (paragraph 3).

That statement is the legislative intent of the voters who passed Proposition 200.

Concluding that an initial term of jail can be imposed on a first time drug offender directly contradicts the obvious intent of this act. Defendant submits that a sincere, respectful reading of Proposition 200 leads to the conclusion that jail cannot be imposed as an initial condition of probation under Proposition 200.

RESPECTFULLY SUBMITTED this _____ day of June, 1997.

MARICOPA COUNTY PUBLIC DEFENDER

By: _____
*
Deputy Public Defender

Congratulations to the winners of the *for the Defense* article writing contest.

The "Judges" have decided! Our panel of three judges (Dean Trebesch, Jim Haas, Russ Born) recently met and chose the top contestants from among a very good assortment of articles. (Incidentally, the Judges also sprung for the prizes.)

First place goes to **Marci Hoff** for her article entitled, "Prohibited Possessor or Not? (Older is Better)," from the May 1997 issue of *for the Defense*. The first place prize is a pair of Phoenix Suns tickets to a game this season.

Second Place goes to **Doug Passon** for his article, "The Drug Court Experience," from the July 1997 issue. The second place winner receives a $30.00 gift certificate for Lombardi's Restaurant.

Third Place goes to **Ronee Korbin** for "The Secret Society of ROP Designation, aka The Destruction of Due Process," published in the July 1997 issue. The third place winner receives a gift certificate for lunch at Coyote Springs Café.

The editors of *for the Defense* would like to thank everyone who submitted articles. We have received numerous un solicited compliments from readers outside of the office, commenting on the quality and timeliness of the articles. We hope you will keep submitting your wonderful articles.

Our Next Seminar:
"Throwing Away the Key"
Sexual Predator Statutes and Investigating and Defending Child/Sexual Abuse Cases

Saturday,
November 15, 1997
Phoenix, AZ